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No. 03-609

In the Supreme Court of the United States

ROBERT MEMS, NATHANIAL KHALIQ, PHILLIP WEBB, THURMAN SMITH, AND BYRON BROWN,

Petitioners,

VS.

THE CITY OF ST. PAUL – DEPARTMENT OF FIRE AND SAFETY SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' Title VII hostile environment claims were tried to a jury. The district court set the damages period on each verdict form based upon then-applicable circuit precedent. The jury found only Phillip Webb proved liability, and awarded him nominal damages. While the parties were briefing the appeal, this Court decided National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), which prescribed new rules governing the damages period in a hostile environment claim. Applying Morgan retroactively, the court of appeals held that the new rules mandated the same result on Webb's unique facts.

The questions presented are:

I. Does the opinion of the court of appeals conflict with Morgan?

II. Did the court of appeals, affirming various evidentiary rulings, sanction such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power?

LIST OF PARTIES

Respondent is the City of Saint Paul, Minnesota, a municipal corporation. The Department of Fire and Safety Services is an executive department of the City of Saint Paul, with no independent legal capacity to sue or be sued. In all other respects, the caption accurately lists the parties.

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OPINIONS BELOW

The second opinion of the court of appeals in this case (Pet. App. 23-52), from which Petitioners now seek relief, is reported at 327 F.3d 771. The opinion of the district court denying Petitioners' new trial motion (Pet. App. 15-22) is unreported. The opinion of the district court ruling on motions in limine (Pet. App. 1-12) is unreported. The first opinion of the court of appeals, reversing in part the grant of summary judgment, is reported at 224 F.3d 735. The opinion of the district court granting summary judgment is reported at 73 F.Supp.2d 1031.

JURISDICTION

The court of appeals denied Petitioners' request for rehearing on July 23, 2003. Petitioners filed the petition for a writ of certiorari on October 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioners commenced this suit against the City of Saint Paul ("City") in 1997, asserting claims under Title VII, 42 U.S.C. § 2000e-2 (1994), and the Minnesota Human Rights Act, Minnesota Statutes § 363.03 (2002), for discriminatory promotional practices, discriminatory disciplinary practices, and hostile work environment. The district court denied Petitioners' motion to certify a class action. On May 28, 1999, the district court granted the City's motion for summary judgment, dismissing all claims. The Court of Appeals for the Eighth

Circuit reversed in part, remanding for trial only the hostile work environment claim.

Commencing November 19, 2001, Petitioners presented their cases to the jury in a trial lasting three weeks. The jury deliberated for ten days and found each Petitioner, except Phillip Webb, had failed to prove liability. The jury found the City liable to Webb, but also found his damages had no monetary value and awarded nominal damages. The opinion below accurately describes each verdict. *See* Mems v. City of St. Paul, Dept. of Fire and Safety Services, 327 F.3d 771, 778 (8th Cir. 2003) (Pet. App. 32). Petitioners filed a memorandum arguing that the district court made various errors and that the verdicts were against the weight of the evidence. Treating the filing as a new trial motion, the district court denied the motion. The court of appeals affirmed and denied a petition for rehearing.

The opinion of the court of appeals accurately summarizes the main facts necessary to an understanding of the issues presented for review. Petitioners' recitation of the highly contested facts adduced at trial, however, is unbalanced and accords no deference to the jury's findings. Respondent submits the following summary to address the misleading statement of facts in the petition.

I. Background.

The fire suppression operations of the Department of Fire and Safety Services ("SPFD") are organized into three shifts, known as the A, B, and C shifts. Each shift is on duty for 24 hours, and the firefighters live, eat, and work at their station while on duty. Firefighters select the shift and station

where they will work through a seniority-based bid system. In this case, for example, Petitioners Robert Mems, Nathanial Khaliq, Byron Brown, and Phillip Webb all elected to work on the B shift at Station 20. With the exception of two white captains, their shift was composed of African-Americans. If the shift was what Petitioners call "racially segregated," the choice was their own. Petitioner Thurman Smith elected to work on the C shift at Station 20. He was the only African-American on his shift.

In February, 1992, newly appointed Fire Chief Timothy Fuller issued General Order No. 153, entitled Policy of Respect. The order states that it is the policy of the SPFD administration to provide a work environment that ensures equal opportunities and mutual respect for all employees. It requires all SPFD members to treat every employee with dignity and respect. In July, 1995, the City promulgated its Workplace Conduct Policy which prohibits discrimination and other offensive behavior. It provides that all complaints will be investigated promptly, fairly, and completely. In conjunction with the promulgation of the policy, Fuller, Mayor Norm Coleman, and the City's affirmative action director made a videotape expressing the importance of the policy and their expectation that it be followed. The SPFD played the videotape in every fire station.

In June, 1994, the City settled a race discrimination lawsuit brought by eleven African-American firefighters, including then-Captain Anthony Carter and all of the Petitioners except Webb. That case alleged acts of discrimination that occurred prior to Fuller's tenure as Fire Chief. Pursuant to the settlement agreement, the SPFD created a new assistant chief position (the second highest rank in the department) to be

responsible primarily for human relations. Fuller selected Carter to fill the position from a list of three names provided by Black Fire Fighters United.

II. B Shift Cases.

Petitioners on the B-shift complained about housekeeping issues, windows left open, the thermostat turned up, and things misplaced in kitchen. Captain DuBois of the B shift testified the housekeeping issues were not race related, and that it is common for shifts to have such disputes. Additionally, the complaints were never contemporaneously reported to DuBois and he never saw the windows opened or thermostat turned up himself, though he was usually the first one to arrive.

When Petitioners complained about an e-mail Firefighter Montanari sent about the 1994 settlement, Khaliq was impeached with the fact that he never identified the existence of such a complaint prior to April, 2001. Likewise, Brown was impeached with the fact that he never indicated he had seen the e-mail prior to trial.

In January, 1995, the A shift complained that the B shift was staying past 8 a.m., and using the showers and bathrooms, which interfered with the A shift's housekeeping duties. The B shift captains, DuBois and Ross, asked the B shift to be out of the showers and bathrooms by 8 a.m., and everyone on the B shift agreed that was reasonable. Nevertheless, on several occasions B shift members continued to remain after their shift, staying in bed, working out, or using the showers, thereby interfering with the A shift's morning duties. On January 14, 1995, A shift Captain Bergstrom asked a B shift captain to

remind his men to empty the dishwasher, and the B shift captain did so over the loudspeaker. A moment later, Webb came down to the watch office acting confrontational and told Bergstrom, "You didn't have to come down and tell on us! . . . I'll never talk to you again!" Webb then got on the loudspeaker himself and said, "Bob [Mems], he couldn't wait to come down and tell on us." Another confrontation developed when an A shift firefighter, Korte, reminded someone about the dishwasher. Khaliq jumped off the treadmill, stood directly in front of Korte, and yelled that it was not his business to notify people the dishwasher was full.

These incidents were reported to A shift District Chief Verros, who passed them on to B shift District Chief Bataglia. In response, Bataglia noted this was a recurring problem that had surfaced about nine months earlier, and ordered the B shift to leave the station at 8 a.m. Mems complained to Carter. Carter immediately rescinded the order before it could take effect and directed the district chiefs to consult with him before taking action of a similar nature again. Carter investigated the matter and, while he felt Chief Bataglia had not exercised wisdom, he found no evidence of race discrimination. Carter also went to Station 20 and met with every member of the A shift, telling them that no discrimination, or even the perception of discrimination, would be tolerated.

Mems complained that someone had tampered with his helmet and bunker pants, and that someone had left the gear shift on the fire engine in pump mode instead of drive mode. However, investigation showed the helmet and pants just experienced normal wear and tear. Captain Ross, of the B shift, did not think anyone intentionally left the gear shift in pump

mode, and Carter concluded it was likely accidental. When Brown raised equipment tampering claims, he was impeached by the fact he had never mentioned them prior to trial.

Webb testified that a basketball hoop behind the station was damaged a couple of times. He never witnessed what happened to the hoop, but admitted that it was located on a lot where tractor-trailers park, and that a truck hit the basketball hoop on one occasion. The trailers parked in the lot were taller than the basketball rim. Ross testified the trucks always parked in the vicinity of the basketball hoop.

Petitioners complained about offensive editorial cartoons from the *Conservative Chronicles* newspaper which they found in the station. Petitioners described them as "racist" because they were drawn in the caricature style typical of editorial cartoons and criticized affirmative action. After Webb complained to the City, no offensive cartoons ever appeared in the station again.

Brown and Mems complained that District Chief Verros ordered them to put on their full turnout gear, including bunker pants and boots. Fire Equipment Operators (FEO's) like Brown and Mems were typically reluctant to wear this gear. Verros demanded, however, that all FEO's wear the gear because of the injuries which can occur when FEO's are called into immediate action. Two white FEO's testified that Verros also ordered them to put on the gear.

In May, 1995, A shift Captain Ness allowed an offensive photograph to be posted on the station bulletin board. On May 25, 1995, he received an oral reprimand for allowing the

posting to occur. As a result, Mems testified the atmosphere between the A and B shifts got "really thick."

Webb complained about McCardle's conduct during the shift change. Their arrangement was that McCardle relieved Webb by taking Webb's gear off the rig and replacing it with his own. Though the shift change officially occurred at 8 a.m., McCardle typically arrived and relieved Webb before 8 a.m. The 1994 settlement did not alter this routine. McCardle testified he never refused to take a run for Webb during the shift change. On May 16, 1995, at 7:27 a.m., the alarm sounded. McCardle had just arrived, and had not yet changed the gear on the rig, when he saw Webb heading down to take the call. They made eye contact and Webb kept coming, indicating to McCardle that Webb would take the run. This was no different than their usual routine. At the time, Webb did not suggest that he felt anything was out of the ordinary. McCardle then went out to his car to get a piece of gear he had taken home to wash. Walking toward the parking lot, Mems joked with McCardle that "[he'd] got out of that run," and McCardle replied in a joking manner, "We don't start till eight o'clock."

On July 1, 1995, at 7:48 a.m., a telephone alarm came in. The B shift was finishing its tour of duty and McCardle was already in the station. When McCardle arrived, he went straight up to the dorm area to take his gym bag to his locker, and then went to get some aspirin because he had a headache. He and his captain were talking in the dorm area when the alarm sounded. He had neither changed the turnout gear on the rig yet, nor seen Webb that morning. McCardle went to look for Webb to see if he was going to take the run and, when he got to the top of the stairs, he saw Webb getting onto the rig.

When Webb came back from the run, McCardle was sitting at the kitchen table. Webb came into the kitchen and asked McCardle if he wanted to start at 8 a.m. now. McCardle said he did not care, it was up to Webb. Webb grew very angry, said McCardle was trying to set him up, and called him a "chickenshit." Webb raised his voice, and kept yelling, getting more and more angry. Finally, Webb threw his gym bag down on the floor, clenched his fists, stepped toward McCardle, and said, "We'll handle this anyway you want." McCardle felt physically threatened by Webb. At that point, Khaliq came in and yelled Webb's name. McCardle and Khaliq both testified that McCardle had remained seated at the kitchen table. The incident ended when Webb picked up his gym bag, called McCardle a "girl" and a "chickenshit" again, and walked out, repeating "chickenshit A shift."

The next day, McCardle tried to explain to Webb what happened. Webb said that Mems had told him McCardle was laughing at him, and that he did not believe McCardle's explanation. The very next day, July 3, 1995, McCardle took another run for Webb before 8 a.m., and continued to take runs for him up to the time he retired in December, 1998. Webb never spoke to McCardle again.

In December, 1996, Khaliq was filling in back at Station 20, and left some personal magazines out on a work bench. When he returned the next day, two of them had been damaged. Carter personally interviewed everyone on the A shift and had the police test the magazines for fingerprints. Short of subjecting the men to lie detector tests, which was illegal, Carter could do nothing more. The investigation never identified a

culprit. After Khaliq made the complaint, however, no further similar incidents occurred.

Khaliq also complained at trial about the way District Chief Zilliox treated him at Station 14. Contrary to Khaliq's testimony, Zilliox described his relationship with Khaliq during the year they spent together at Station 14 as "very workable." Zilliox testified that Khaliq was a fine FEO. Zilliox was not aware of any conflicts or problems between them. Khaliq never expressed to Zilliox a belief that he was being treated differently. Khaliq also complained that Zilliox had denied him a holiday meal hour. Zilliox testified that due to staffing levels, he could not give everyone the meal hour, and that, accommodating as many people as possible, several firefighters at several stations could not take the meal hour. Zilliox left it to the stations that had fewer meal hours than firefighters to decide how they would divide up the hours allotted.

III. Smith's Case.

In August, 1994, Smith was filling in for one of the A shift firefighters. Firefighter Caruso reported he smelled alcohol on Smith's breath, so Captain Bergstrom and District Chief Wiesner asked Smith about it. Smith offered to let them smell his breath and satisfied them he did not have alcohol on his breath. Smith never had any problems with Caruso before or after this occasion, and had no idea why Caruso reported him. Smith testified that Caruso had sustained a serious head injury in a motorcycle accident and "is probably not all there." Smith testified that he, too, would report someone he believed came to work with alcohol on their breath. Smith never complained that he thought the incident was an act of discrimination. He

received exactly what he sought, a letter explaining the incident and confirming that the allegation was unfounded.

Smith alleged for the first time at trial that he had seen the *Conservative Chronicles* editorial cartoons the B shift firefighters found in 1995. He was impeached with admissions in prior testimony that he had not seen the cartoons.

In October, 1996, Smith had a heated dispute with Carlisle, an African-American firefighter on the B shift, in which he accused Carlisle of stealing from the C shift food locker. The next thing Smith knew, police officers came to the station and asked to search him and his effects. Carlisle had reported to Captain Ross of the B shift that he saw crack cocaine fall out of Smith's locker. Ross was not sure what to do about the allegation, so he mentioned it to Assistant Chief Carter. Carter called the police to investigate. Smith agreed that cocaine in the workplace is a serious allegation that demands investigation. Carter notified the police because the accusation was beyond the SPFD's purview and a crime if it proved true.

Smith had no problems with anyone on the C shift, though he was the only African-American on the shift. He testified that he gets along well with his C shift colleagues.

IV. Personality Conflict.

Fuller and Carter viewed the situation at Station 20 as one that needed conflict resolution. Conflicts between shifts at a station are common, regardless of race. Both the B shift captains, Ross and DuBois, testified that they did not get along on a personal level with the A shift captains for reasons having

nothing to do with race. The A shift felt that the problem with B shift was a personality conflict. Captain Ross, on the B shift, agreed that it was a personality conflict. Ross never witnessed anyone on the A shift express racial hostility toward the B shift.

ARGUMENT

Neither question presented by the petition for a writ of certiorari warrants further review in this Court. With respect to the first question, this Court should deny the petition because the opinion below does not conflict with National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), and does not raise an important question of federal law. With respect to the second question, the evidentiary rulings which the court of appeals unanimously affirmed bear no indicia of a departure from the usual and ordinary course of judicial proceedings. Petitioners advance no genuine reason for the exercise of supervisory power. Therefore, Petitioners merely ask this Court to sit as yet another court of error.

I. The Opinion below Does Not Conflict with Morgan and Does Not Raise an Important Question of Federal Law.

In Morgan, this Court handed down new rules for applying the statute of limitations in Title VII disparate treatment cases. *See, generally,* 536 U.S. at 113-18. The court of appeals faithfully discussed and applied the controlling principles handed down in Morgan. No district court now reading the Eighth Circuit's post-Morgan decisions should be confused about how to apply Morgan. Further, the decision has no broad importance because its harmless error analysis was

factbound, and the occasion to apply Morgan retroactively will not recur.

The court of appeals quoted Morgan extensively, and the majority and dissenting opinions agreed in their statement of the rules handed down in Morgan. *Compare* Mems, 327 F.3d at 784-785 (Pet. App. 45-46) *with id.* at 786-87 (Pet. App. 49-50) (Heaney, J., dissenting). Correctly reciting the Morgan rules, the majority opinion stated:

> In Morgan, the Supreme Court held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." 122 S.Ct. at 2077. The question for liability as well as damages after Morgan is whether the acts complained of are part of the same unlawful employment practice. If so, then all of the acts may be considered so long as one of the acts falls within the limitations period. If not, then only the acts which fall in the limitations period may be considered.

Mems, 327 F.3d at 784 (Pet. App. 45); *compare* Morgan, 536 U.S. at 117-18. Consistent with the majority opinion, the dissent wrote: "the plaintiff *need not* prove damages occurred within the statutory period so long as any act contributing to the hostile work environment did." Mems, 327 F.3d at 787 (Pet. App. 50) (emphasis in original). Further, and still consistent with the majority's above-quoted rule of law, the dissent wrote:

"the proper question is not whether [Petitioners] proved *damages* from conduct within the statutory period, but rather whether *any act* contributing to the allegedly hostile work environment took place within the statutory period." *Id.* (emphasis in original). Thus, the court of appeals correctly and consistently stated the law Morgan mandates. Therefore, the error Petitioners ask this Court to review is merely an alleged "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10.

The majority and dissent parted company only when it came to applying Morgan to the trial record post hoc. The majority determined that "arguments regarding the damages period only apply to [Petitioner] Webb because the jury did not reach damages for any of the other [Petitioners]." Mems, 327 F.3d at 783 (Pet. App. 43). In other words, for Petitioners who failed to prove liability, that is, who failed to *reach* the damages question, any error regarding the damages period was harmless. The dissenting opinion upon which Petitioners rely, however, somehow concluded that the majority would require a plaintiff to prove damages occurred during the statutory period before they could recover. *Id.* at 787 (Pet. App. 50-51). Respectfully, the dissent was mistaken.

In the majority's analysis, the distinction between Webb and the others was not who *proved* damages occurred within the statutory period – none of them proved damages – but who *reached* the damage question at all. *See id.* at 783 (Pet. App. 43). The jury awarded Webb nominal damages, demonstrating that even he failed to prove damages. Thus, the fact that the court applied the Morgan analysis to Webb's claim confirms that, contrary to the dissent's reading, the court did not require

proof that damages occurred within the statutory period. For the purposes of establishing liability, Petitioners presented evidence of all acts dating back to the 1994 settlement agreement, including the acts described in the majority and dissenting opinions and more. Considering all these facts, the jury found that four of the Petitioners failed to prove liability. Because these Petitioners failed to reach the damage question, the court found that the damage limitation did not affect their outcomes. This harmless error determination was logical, factbound, and has no ramifications beyond the instant case.

Petitioners also argue that the jury might have considered the facts concerning the earlier incidents differently had the jury known it could award damages for them. The jury instructions and the verdict form, however, did permit the jury to consider these acts for the purposes of liability. Nevertheless, the issue arises only because of the retroactive application of Morgan and will not recur. With Morgan in hand, the district courts will never again fashion instructions and verdict forms based upon pre-Morgan case law. Thus, this unique issue presents no occasion for this Court to resolve a matter of national importance.

Petitioners also take issue with the court's ruling that the only acts for which the jury could have found liability in Webb's case were the discrete acts relating to the so-called McCardle incident. Specifically, Petitioners disagree with the court's decision to discount the non-discrete, environment acts that occurred within the statutory period. *See* Mems, 327 F.3d at 787-88 (Pet. App. 50-51). The court discounted these acts because they were experienced by other Petitioners as well and, in their cases, the jury found that the City took prompt and

effective remedial action. *Id.* at 785 (Pet. App. 46-47). Accordingly, the court found that only the discrete acts relating to the McCardle incident, which occurred within the statutory period, distinguished Webb's case from the others. *Id.* Again, the court's analysis was logical, fair, and factbound.

Finally, in a rather perplexing argument, Petitioners suggest that Morgan somehow mandates a reversal of the district court's decision to exclude their expert witness as a discovery sanction. Petitioners apparently argue that the district court lacked the foresight to shun then-binding precedent in favor of the to-be-anticipated Morgan decision, and thereby forced them to violate the pretrial order. Further, Petitioners continue to misrepresent the facts, asserting that they went to see Dr. Taborn in secret to "narrow" the scope of his testimony. To the contrary, the court of appeals rejected this representation, finding that Dr. Taborn's notes of the meetings include "factual allegations and symptoms not in Dr. Taborn's other reports." Mems, 327 F.3d at 780 (Pet. App. 35). In short, Petitioners' attempt to use the discovery sanction to establish a conflict with Morgan falls flat.

In sum, the opinion of the court of appeals does not conflict with Morgan, and raises no important question of federal law. The majority and dissenting opinions agreed that, under Morgan, the district court had applied the wrong legal analysis for the damages period. The majority found it was harmless error under the unique facts of the case; the dissent would have remanded for a new trial. Because this disagreement was factbound, the decision has no broader importance.

II. The District Court's Evidentiary Rulings Did Not Depart from the Usual and Accepted Course of Judicial Proceedings.

The district court's evidentiary rulings, which the court of appeals unanimously affirmed, do not call for this Court to intervene and exercise supervisory power. Petitioners advance no grounds to conclude that the court of appeals sanctioned a departure from the usual and ordinary course of judicial proceedings. To the contrary, the court of appeals simply applied the deferential standard of review long established in the Eighth Circuit. *See* Mems, 327 F.3d at 780 (Pet. App. 37) ("Appellants must show that the district court abused its discretion and that the ruling was prejudicial to the point of producing a different result.") (citing Bevan v. Honeywell, Inc., 118 F.3d 603, 612 (8th Cir. 1997)). To demonstrate that the court of appeals merely reviewed and ruled upon perfectly ordinary evidentiary disputes, and to correct Petitioners' various misstatements of fact, the City submits the positions it advanced below.

A. The Ness photograph.

Petitioners claim they perceived a photograph posted in Station 20, showing Captain Ness and another firefighter extending their middle fingers to the camera, to be an act of racial harassment. Petitioners proffered the picture as evidence in support of the subjective element of their claim, specifically, that the picture said to them: "Fuck you, nigger." It was undisputed that these words were never in fact uttered, and that no racial slurs occurred at Station 20 after the 1994 settlement. The City moved, under Rule 403 of the Federal Rules of

Evidence, to exclude the photograph or, alternatively, to preclude Petitioners from testifying that it communicated a racial slur to them. The City objected to the attempt by Petitioners to inject perhaps the most explosive of all racial epithets into evidence by testifying that they inferred it from the photograph.

Ruling on the evidence as it was proffered pretrial, the district court found that Petitioners' attempt to introduce the photograph as a racial slur, to prove up the subjective element of their claim, was classic Rule 403 evidence. At trial, Petitioners invited the court to revisit its ruling. The district court found that the representations of Petitioners' counsel at trial were "dramatically different" than the pretrial submissions, indicated that it had already ruled on the basis of the record previously submitted, and declined the invitation to reconsider.

Petitioners then offered mid-trial, for the first time, a second reason for introducing the photograph, that is, that it was a catalyst for later events. In light of this new proffer, the district court modified its ruling. The judge permitted Petitioners to elicit testimony that there was an offensive posting on the bulletin board, that Ness was disciplined for allowing the posting to occur, and that events followed therefrom. The judge permitted Petitioners to testify that they complained about the photograph and that, as a result of Ness' reprimand, "the atmosphere got really, really, thick." Additionally, Petitioners and their counsel succeeded in informing the jury that Ness was in the picture, and that they perceived it to be an act of racial harassment.

The district court was well within its sound discretion to exclude the photograph based upon the inflammatory purpose

for which it was originally offered. A judge must make evidentiary rulings based upon the purpose for which the evidence is offered. When Petitioners later added that they needed the photograph for an additional purpose, the district court fairly and reasonably modified its ruling to accommodate that need. Moreover, Petitioners have failed to meet their burden of proving that, in light of all the evidence that did come in on the subject, the exclusion of the photograph itself was "so prejudicial that a new trial would likely produce a different result." *See* Bevan, 118 F.3d at 612.

B. Barry Harrison's furniture at Station 18.

Petitioners argue that the trial court erred in excluding evidence concerning a "noose" allegedly carved into a piece of furniture owned by Barry Harrison. Petitioners sought to introduce testimony that Mems and Khaliq had seen the damaged furniture. They offered the evidence for the purpose of establishing that the harassment they experienced was pervasive and severe, and that the City failed to take prompt remedial action. Petitioners failed to preserve the issue for review, however, because they made no offer of proof about what the City did or did not do in response to the alleged vandalism.

Further, Petitioners misstate the law to suggest that evidence of co-worker harassment is always relevant and always admissible. Neither case Petitioners cite, Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999), or Schwapp v. Town of Avon, 118 F.3d 106 (2nd Cir. 1997), considered a set of facts like those before the district court, and neither case holds that a

trial judge must categorically reject Rule 403 as null and void where co-worker harassment is alleged.

In Schwapp, the plaintiff offered evidence that the same immediate supervisors who had harassed him also made racially derogatory comments to others in the same police station. Schwapp, 118 F.3d at 108-09. Reversing summary judgment, the court held that the "mere fact that Schwapp was not present when the racially derogatory comment was made" – the sole basis for the trial court's ruling – "did not render that comment irrelevant." *Id.* at 111. Likewise in Carter, the plaintiff was told that degrading graffiti about her was written in the men's restroom at her workplace. 173 F.3d at 697. Reversing summary judgment, the Carter court ruled the graffiti was relevant, citing Schwapp for the proposition that evidence of comments made outside plaintiff's presence is allowable. *Id.* at 701 n.7. Thus, evidence of harassment occurring outside the plaintiff's presence must not be automatically excluded. But neither must it be blindly admitted. The cases do not hold, as Petitioners would have it, that evidence of co-worker harassment universally circumvents Rule 403. Rule 403 rulings are factbound and must be reviewed as such.

In making their rulings, neither Schwapp nor Carter had occasion to consider the probative value of alleged harassment to a co-worker who, like Harrison, works (1) in a different facility in another part of town, and (2) with a different set of co-workers and immediate supervisors. These distinctions are all the more significant in light of the fact that Petitioners made no offer of proof as to the identity of Harrison's alleged harasser. Thus, Petitioners made no showing that the vandalism was relevant to their own hostile environment claims, which

generally alleged hostility from the A shift personnel at Station 20.

In sum, based on the offer of proof before it, the district court did not abuse its discretion in excluding the evidence. Further, Petitioners did not establish a likely different outcome if a new trial were granted because they made no offer of proof regarding the City's remedial response to the alleged vandalism.

C. Captains' conflict regarding window washing schedule.

The district court did not abuse its discretion in excluding the testimony of a conversation between B shift Captain DuBois and A shift Captain Ness. DuBois testified that Ness called him a "fucking idiot" in a dispute about the schedule for washing the station windows. Petitioners argue the hostility toward their captain was somehow evidence of racial hostility. The argument is a meritless half-truth because, on the very page of the transcript to which they cited, DuBois confirms that the confrontation took place prior to the June 1994 settlement agreement. It was never disputed that evidence of racial hostility occurring prior to the settlement should be excluded. Accordingly, *with the assent of Petitioners' counsel*, the district court excluded this evidence of pre-settlement acts. DuBois then proceeded to testify at length about how he felt the A shift subjected him to the same racial hostility as his crew.

D. Witness attacking the character of Chief Zilliox.

Petitioners argue that they were denied the opportunity to prove up their prima facie case when the district court

excluded the rebuttal testimony of Rodney Edwards on the subject of Chief Zilliox's alleged racial bias. If, as Petitioners apparently admit, Edwards' testimony about his unrelated incident with Chief Zilliox was properly part of their prima facie case, they can blame only themselves for not offering it in their case in chief. The district court did not abuse its discretion when it ruled that the testimony "may or may not have been relevant in the [Petitioners'] case in chief, but it is not appropriate for the rebuttal phase."

E. Debra Giles Smith's damages testimony.

Petitioners object to the exclusion of Debra Giles Smith's testimony concerning the effects of alleged discrimination on their marriage. Since Smith failed to prove up his liability claim, the exclusion of damages testimony did not prejudice him. Moreover, Giles Smith did testify about how the alleged discrimination affected their home life and, indeed, testified that it led to their divorce. The Court denied the City's motion to strike this testimony, but instructed Petitioners' counsel to move on. Because Petitioners' counsel did not object to that ruling at trial or make an offer of proof, and the ruling was not plain error, the objection was waived. *See* McKnight By and Through Ludwig v. Johnson Controls, Inc., 36 F.3d 1396, 1407 (8th Cir. 1994).

F. Allegations of drug use by white firefighters.

Petitioners argue that the district court improperly excluded evidence that the City treated a white firefighter accused of drug use differently than it treated Smith. The district court correctly found that Petitioners' own testimony of

what occurred was hearsay and that they failed to identify any witnesses with foundation to testify. Additionally, they never made an offer of proof to show what the testimony from a witness with proper foundation would have been, and thus, again, failed to preserve the issue for appeal.

CONCLUSION

For the foregoing reasons, the City of Saint Paul respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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